IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-6593
74-5693

DANIEL WILBUR GARDNER,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Florida entered on February 26, 1975.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is reported at ___ So.2d ___, Fla. Sup. Ct. No. 45,106 (February 26, 1975) (slip opinion), and is set out in Appendix A hereto, pp. 1a-9a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Florida was entered on February 26, 1975, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Florida violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

II. Whether nondisclosure of a "confidential" portion of a pre-sentence investigation report to a defendant convicted of a capital crime constitutes a denial of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, and of the right to a fair hearing as guaranteed by the Due Process Clause of the Fourteenth Amendment, in a case where the trial judge declines to accept a jury recommendation of a life sentence and instead imposes the death sentence partially on the basis of the pre-sentence report?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the statutes of Florida:

> Fla. Stat. Ann. §755.082 (1974-1975 supp.)
> Penalties for felonies and misdemeanors
> "(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.
> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).
> (3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). . . ."

> Fla. Stat. Ann. §782.04 (1974-1975 supp.) [1/]
> Murder
> "(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (17) years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §755.082.
> (b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.
> (2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary,

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1/ This section was amended in 1974, and the statutory definition of second degree murder was altered slightly. Florida Laws 1974, c. 74-383, §14 (effective July 1, 1975) enacts a new §782.04, which provides:

> "782.04 Murder
> (1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person eighteen years or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in chapter 775.
> (b) In all cases under this section the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.
> (2) The unlawful killing of a human being when perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 755.
> (3) When a person is killed in the perpetration of or in the attempt to perpetrate any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in section 775.082, section 775.083, or section 775.084."

Fla. Stat. Ann. §782.07 (1974-1975 supp.)
Manslaughter

"The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084."

Fla. Stat. Ann. §784.02 (1974-1975 supp.)
Punishment for assault

"Whoever commits a bare assault is guilty of a misdemeanor and, upon conviction, shall be guilty of a misdemeanor of the second degree, punishable as provided in §755.082 or §755.083."

Fla. Stat. Ann. §784.03 (1974-1975 supp.)
Punishment for assault and battery

"Whoever commits assault and battery is guilty of a misdemeanor and, upon conviction, shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."

1/ Cont'd.

(4) The unlawful killing of a human being when perpetrated without any design to effect death, by a person engaged in the perpetration of or in the attempt to perpetrate any felony, other than any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb, . . . shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in chapter 775."

Fla. Stat. Ann. §784.04 (1974-1975 supp.)
Aggravated assault

"Whoever assaults another with a deadly weapon, without intent to kill, shall be guilty of an aggravated assault, and shall be guilty of a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084."

Fla. Stat. Ann. §784.06 (1974-1975 supp.)
Assault with intent to commit felony

"Whoever commits an assault on another, with intent to commit any capital felony or felony of the first degree shall be guilty of a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084. An assault with intent to commit any other felony constitutes a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084."

2/

Fla. Stat. Ann. §921.141 (1974-1975 supp.)
Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

"(1) Separate proceedings on issue of penalty. Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 755.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7), of this section. [3/] Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury. After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances

2/ Subsection (1) of this statute was amended slightly in 1974 by Fla. Laws 1974, c. 74-379 (effective October 1, 1974) to provide that if through "impossibility or inability" the trial jury is unable to reconvene for a hearing or sentencing, a special jury may be summoned.

3/ The subsection setting forth aggravating circumstances and mitigating circumstances in Fla. Stat. Ann. §921.141 (1974-1975 supp.), however, are numbered, respectively, (5) and (6).

exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist, and

(c) Based on these considerations, whether the defendant should be sentenced to life . . . or death.

(3) Finding in support of sentence of death. Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

(4) Review of judgment and sentence. The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances. -- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest of effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious or cruel.

(6) Mitigating circumstances. -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant, at the time of the crime."

Fla. Stat. Ann. §922.09 (1973) Capital cases

"When a person is sentenced to death, the clerk of the court shall prepare a certified copy of the record to the governor. The sentence shall not be executed until the governor issues a warrant, attaches it to the copy of the record, and transmits it to the warden, directing him to execute the sentence at a time designated in the warrant."

Fla. Stat. Ann. §922.10 (1973) Execution of death sentence

"A death sentence shall be executed by electrocution. The warden of the state prison shall designate the executioner. The warrant authorizing the execution shall be read to the convicted person immediately before execution."

Fla. Stat. Ann. §922.11 (1973) Regulation of execution

"(1) The warden of the state prison or a deputy designated by him shall be present at the execution. The warden shall set the day for execution within the week designated by the governor in the warrant.

(2) Twelve citizens selected by the warden shall witness the execution. A qualified physician shall be present and announce when death has been inflicted. Counsel for the convicted person and ministers of the gospel requested by the convicted person may be present. Representatives of news media may be present under regulations approved by the head of the department of general services. All other persons except prison officers and guards shall be excluded during the execution.

(3) The body of the executed person shall be prepared for burial and, if requested, delivered at the prison gates to relatives of the deceased. If a coffin has not been provided by relatives, the body shall be delivered in a plain coffin. If the body is not claimed by relatives, it shall be given to physicians who have requested it for dissection or be disposed of in the same manner as are bodies of prisoners dying in the state prison."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Florida entered on February 26, 1975, affirming petitioner's first degree murder conviction and death sentence. Petitioner, Daniel Wilbur Gardner, a white man, was sentenced to death on January 30, 1974, in the Circuit Court of the Fifth Judicial Circuit of Florida in and for Citrus County, upon conviction for the murder of his wife, Mrs. Bertha Mae Gardner, a white woman.

The Gardners were married in 1966, when he was 33 and she was 21, R. 13.[4/] Mrs. Gardner's mother, Mrs. Glenda Mae Demney, lived in a trailer owned by petitioner, T. 188, "[r]ight beside", T. 167, the trailer in which the Gardners and their four children lived. On the evening of June 29, 1973, Mrs. Demney and her daughter, who had been drinking beer together, T. 170, took two

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4/ The record in the Florida Supreme Court is not consecutively paginated. Volume I consists of motions, orders and other written documents and is paginated from 1 to 72; citations to these pages will hereinafter be prefaced by "R." Volumes II and III consist of the transcript of the trial and sentencing hearing and are paginated from 1 to 360; citations to these pages will hereinafter be prefaced by "T." A twelve page unpaginated Supplement to Transcript of Record was filed in the Florida Supreme Court on May 8, 1974. See note 15, infra.

of the Gardner children to the home of a relative, T. 169. Mrs. Gardner then proceeded to the Sugar Mill Bar where she apparently stayed for about two hours. T. 169-171. She returned to the Demney trailer about 10:00 p.m. and announced that she was going to look for petitioner, T. 171, and "bring him home," T. 172.

Later that evening, between 11:00 and 11:30 p.m., as Mrs. Demney and a "male friend," T. 172, Mr. Alva "Buckeye" Loenecker, were drinking whiskey and beer together, petitioner suddenly tore the door off the trailer,[5/] rushed in and, without saying anything, T. 173, struck Mrs. Demney on the side of the head, knocking her unconscious, T. 173. He appeared to her to have been drinking but not to be "drunk." T. 176. "Buckeye," who testified that petitioner was "as good a friend as I ever had," T. 185, then "asked him not to do that no more," T. 187, and petitioner responded that "he was going back and beat hell out of his wife and I ["Buckeye"] said 'please don't do that Bill,'" T. 187. "Buckeye" stated that he did not see petitioner beat his wife, ibid., but:

> "I seen her [Mrs. Gardner], she was at the door of the [Gardner] trailer, and he put her down like that there and went to pulling her head, and she said 'please don't hit me no more', it could have been her that said it, now, or could have been the T.V. was playing loud."

Ibid. Petitioner returned briefly to the Demney trailer about a half hour later and appeared to "Buckeye" to want "to jump on

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5/ Mrs. Demney testified that petitioner "broke down the door" "hinges and all," T. 172. "Buckeye" stated that petitioner "jerked the door down and come in," T. 194.

Glenda Mae" Demney again. T. 188. "Buckeye" told him "'Bill you done wrong [to hit Mrs. Demney]', and he said 'yeah, I believe I have'", ibid. Petitioner then returned to his trailer.

Petitioner's half-brother, who lived in a house one hundred and fifty feet away from petitioner's trailer, heard petitioner talking (although not loudly) later that night. T. 203. Petitioner's aunt, who lived less than half a block away from petitioner, was awakened at about 11:30 p.m. by "some bumping, moving furniture" in petitioner's trailer. T. 206.

At about 7:00 a.m. the next morning, June 30, petitioner reappeared at his mother-in-law's trailer. According to Mrs. Demney, he told her "to come over and check on my [Mrs. Demney's] daughter, said My G.D. Daughter, said she wasn't breathing right."[6/] T. 174. Mrs. Demney proceeded to the Gardner trailer and found her daughter's body lying on the bed, naked and covered with bruises. Mrs. Demney stated that petitioner "wanted me to slap her face, call her, and I said 'I will not, I will call her but I won't slap her', and I just touched her and told him he had better call an ambulance." T. 175. Petitioner said nothing, and just "kept mumbling from the front door to the bed room." Ibid. When "Buckeye" entered the trailer a few minutes later, he saw petitioner holding the body of his wife:

6/ "Buckeye", who had spent the night in the Demney trailer, testified that petitioner came to that trailer about 7:00 a.m. "and called me, said something was wrong with his wife . . . . said something has happened to my wife, that I can't get her awake, looks like she has took some dope." T. 189-190.

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> "I seen her, he had her up in his arm and her head over here, and that's all I could see. And he said 'I can't understand why my wife won't wake up, looks like she's' -- said 'have I killed her or is she dead', and I said 'she looks like she is dead', and he asked me to go call the ambulance, and then I sent and got his mother."

T. 190. Petitioner's mother testified that she came immediately to the trailer and said to petitioner, "'Dan, what have you done?', and he says 'I haven't done anything', he says 'I want somebody to get some help'". T. 197. After his mother had her daughter-in-law call an ambulance, she returned to find petitioner weeping on the couch; he said to her "'mom she wouldn't tell me where my babies are and I tried to get her to tell me and she wouldn't so I kept on beating her, she never would tell me where my babies' . . . . . [sic]" T. 198.

Medical tests subsequently indicated that Mrs. Gardner had died from a severe beating and attendant blood loss and internal hemorrhage.[7/] T. 256-259. The autopsy also revealed that at the

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7/ The trial judge, in his "Findings of Fact" made for purposes of sentencing, summarized the pathologists's testimony concerning the injuries Mrs. Gardner's body had sustained:

> "(a) At least one hundred bruises upon her head, both eyes, nose, abdomen, arms, both breasts, chest, back, thighs and legs.
> (b) Large patches of healthy hair pulled from her head as a result of her hair being grabbed, leaving bald spots.
> (c) Abrasions, bruises and contusions to the head as a result of her hair being grabbed and her head pushed against the wall or floor.
> (d) Massive hemorrhage of the scalp, small hemorrhages under the covering of the brain, and contusions of the nose.
> (e) Massive hemorrhage of the pubic area,

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time of her death her blood alcohol content was .19%, indicating a state of intoxication which was almost twice the level defined as "legal" intoxication. T. 267.

The police were summoned, and petitioner was arrested. Shortly before he was placed in the patrol car, he said to his half-brother, "Dave, I guess I really did it this time." T. 204. The police informed petitioner of his constitutional rights, and on the way to the station, petitioner declared "'why would a man do something like that', -- 'why did I do something like that', and . . . [a deputy sheriff] said 'why did you'?" T. 240. Petitioner replied that "his wife had been running around with other people, and said she had been out with his brother, and he said 'that thing has been eating on me', he said 'it was just more than I could stand.'" Ibid.

7/ cont'd.

> including the inner surface of the thigh and the labia of the vulva.
> (f) Bruised and swollen external genitalia.
> (g) Hemorrhage in and around the right adrenal gland and right kidney.
> (h) A large laceration on the perineum extending from the posterior part of the vagina toward the anus.
> (i) Large tears inside the vagina from the outside entrance all the way to the back as far as it could go, caused by a broom stick, bat or bottle.
> (j) A large laceration or tear of the entire right side of the liver.
> (k) The peritoneal cavity or bone located in the pubic area in the lower part of the body, was broken up into small pieces by blunt injury such as being stomped on."

R. 49-50.

Petitioner's jury was instructed that it could find him guilty of first degree murder, second degree murder, third degree murder, or manslaughter, or not guilty. R. 17; T. 299, 315. The jury found petitioner guilty of first degree murder. R. 39; T. 322.

At the sentencing hearing, the State introduced photographs of the deceased's body and rested, waiving closing argument. T. 323-324, 349.

Petitioner testified that he had eaten no food on June 29, and had had two shots of whiskey and five beers in the morning, T. 328-329, had drunk three shots of vodka around noon, T. 330, had spent the early afternoon drinking whiskey in the Sugar Mill Bar, T. 331, had drunk more beer and had then gone to another tavern where he drank until after dark, T. 331-332, had returned to the Sugar Mill where he drank two or three more whiskeys, T. 333. He testified that he met his wife there and that they drank together for awhile and left the bar at about 11:30 p.m., drinking whiskey on the way home. T. 336. He stated that he recalled having an argument with his wife because he wanted to know where the children were and she refused to tell him, T. 338, but he denied beating her (although he admitted "hitting her with the back of my hand", T. 344).

On January 10, 1974, the jury returned an advisory sentencing verdict that "the [m]itigating circumstances do outweigh the aggravating circumstances. We therefore advise the court that a life sentence should be imposed herein upon the defendant by the court." T. 358. See also R. 44.

The trial court ordered a "pre-sentence investigation" of petitioner on January 10. T. 357. Part of this report, R. 49, was made available to petitioner's counsel. The report indicated that petitioner had been arrested on a number of occasions,[8/] but it indicated no prior felony convictions. It contained the statement that:

> "Law enforcement authorities are quite strong in their opinion of the subject, they consider the subject a menace to society. They feel he should not be let to roam the streets for what he did to his wife. They stated that the subject had a long line of assault charges on his wife, that should be taken into count [sic] about this subject."

Supplement to Transcript of Record (filed in Florida Supreme Court on May 8, 1974)(unpaginated).

On January 30, the trial judge announced "Findings of Fact", R. 49-50, and entered a Judgment and Sentence ordering petitioner to be electrocuted. These Findings noted that the jury had returned an "Advisory Sentence" of life imprisonment but concluded that "after carefully considering and weighing the evidence presented during . . . trial and sentencing . . ., the arguments[9/]

8/ This report stated that petitioner had been arrested on the following charges: disorderly conduct and fighting ($25.00 fine); vagrancy (dismissed); "malice mischief" (no disposition shown); "disorderly conduct (drunk)" ($10.00 fine); "drunk"($15.00 fine); "investigation of aggravated assault" (released); assault with intent to commit murder (nolle prosequi entered); passing worthless $25.00 check (restitution and court costs); disorderly conduct ($30.00 fine); assault and battery (dismissed); assault and battery (dismissed). Supplement to Transcript of Record (filed in Florida Supreme Court on May 8, 1974)(unpaginated).

9/ The prosecution made no argument at the sentencing stage, however. T. 349.

of the attorneys as to the sentence to be imposed and reviewing the factual information contained in said pre-sentence investigation," the crime for which petitioner stood convicted "was especially heinous, atrocious or cruel; and that such aggravating circumstances outweighs the mitigating circumstances, to-wit: none." R. 49. As evidence of the "especially heinous, atrocious and cruel acts" committed by petitioner, the Findings recited the injuries to the victim quoted in note 7, supra.

On February 26, 1975, the Supreme Court of Florida affirmed petitioner's conviction and death sentence with two Justices dissenting.[10/] Mr. Justice Ervin while not abandoning his opinion that the Florida capital punishment statute is unconstitutional, see, e.g., State v. Dixon, 283 So.2d 1, 11-23 (Fla. 1973), declared in dissent:

> "This was a crime of passion in a marital setting in which the excessive use of alcohol was a material factor resulting in the homicide. As I read our statutes, this type of crime does not merit the death penalty because the discretion exercised to impose that penalty here extends beyond the discretion the statutes repose in governmental

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10/ On March 17, 1975, the Supreme Court of Florida stayed execution of petitioner's sentence "to and including April 17, 1975 to allow appellant to seek review in the Supreme Court of the United States and obtain any further stay from that Court." On April 7, 1975, Mr. Justice Powell entered an order providing "that the execution and enforcement of the sentence of death imposed upon the petitioner is hereby stayed pending the timely filing and disposition by this Court of a petition for a writ of certiorari."

> officials for such purpose. I do not believe that the statutes contemplate that a crime of this nature is intended to be included in the heinous category warranting the death penalty. A drunken spree in which one of the spouses is killed traditionally has not resulted in the death penalty in this state. There may, of course, be situations where murder of one's spouse would warrant the death penalty pursuant to the statutes, especially where there is a calculated design and premeditation to rid one of his or her spouse; but this case involving a crime of passion in a drunken spree hardly appears covered by the statutes."

Gardner v. State, Fla. Sup. Ct. No. 45,106 (February 26, 1975) (slip op. at 8-9); App. A, infra, at 8a-9a.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner's Assignment of Error No. 18 in the court below recited that "[t]he court erred in sentencing defendant to death . . . because . . . [the Florida statutes authorizing imposition of the death penalty] contravene the . . . United States Constitution by . . . providing for cruel and unusual punishment." In his brief, petitioner contended that "the procedure by which appellant was condemned to death is unconstitutionally discretionary; and the death penalty is per se cruel and unusual . . . . Furman v. Georgia, 408 U.S. 238 (1972)." Brief of Appellant at 37. A majority of the Florida Supreme Court rejected this claim when it affirmed petitioner's sentence

in an opinion which stated that the Court had "examined and considered the record in light of the assignments of error and briefs filed." Gardner v. State, Fla. Sup. Ct. No. 45,106 (Feb. 26, 1975), slip op. at 3; App. A, infra, at 3a.

II. Petitioner's Assignment of Error No. 12 in the court below recited that "[t]he court erred in rendering its finding of fact in support of the death penalty because the court considered factors not based upon the record of the trial and the sentencing proceedings in contravention of Fla. Stat. §921.141(3)," and his Assignment of Error No. 13 recited that "[t]he court erred in considering the presentence investigation of defendant." In his brief, appellant contended that "[t]he trial court's review and consideration of the p.s.i. report in the case at bar deviated from both Fla. Stat. §921.141 and State v. Dixon, [283 So.2d 1 (Fla. 1973)]." Brief of Appellant at 16. The Florida Supreme Court tacitly rejected this claim when it affirmed petitioner's conviction and sentence in a per curiam opinion. Gardner v. State, Fla. Sup. Ct. No. 45,106 (Feb. 26, 1975); App. A, infra. Dissenting from this opinion, Mr. Justice Ervin declared:

> "What evidence or opinion was contained in the 'confidential' portion of the report is purely conjectural and absolutely unknown to and therefore unrebuttable by Appellant. We have no means of determining on review what role such 'confidential' information played in the trial judge's sentence, and thus I would overturn Appellant's death sentence on the basis of this fundamental error alone."

Id. at 7; App. A, infra, at 7a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF FLORIDA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Writ of Certiorari to the Supreme Court of Florida, Hallman v. Florida, No. 74-6168 (filed March 11, 1975)(attached as App. B, infra).

The potential for freakish and arbitrary imposition of the death penalty under Florida's post-Furman capital punishment statute is highlighted in this case where the jury returned a first degree murder verdict[11] despite the total absence of proof

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11/ The Florida Supreme Court's recent decision in Gilford v. State, Fla. Sup. Ct. No. 44,535 (April 9, 1975), slip opinion attached as Appendix C, infra, does not alter the long-standing Florida rule that in a first degree murder case, a defendant has an absolute right to have his jury instructed on second degree murder, third degree murder, and manslaughter, regardless of the evidence. Gilford, a larceny case, further explicated the rules set forth in Brown v. State, 206 So.2d 377 (Fla. 1968) pertaining to the "category 3" and "category 4" kinds of lesser-included-offenses in the Brown typology (respectively, "Offenses necessarily included in the offense charged", and "Offenses which may or may not be included in the offense charged, depending on the accusatory pleading and the evidence." Brown v. State, supra, 206 So.2d at 381 (emphasis in original)). Homicide offenses exemplify what Brown termed a "category 1" kind of offense, "Crimes divisible into degrees." Brown v. State, supra, 206 So.2d at 381. Of such offenses, the Brown opinion declared:

> "Section 919.14 [now Fla. R. Crim. P. 3.490(1974-1975 supp.); at the time of Brown, as now, this provision stated that '[i]f the indictment or information charges an offense which is divided into degrees . . . [t]he court shall in all such cases charge the jury as to the degrees of the offense.'] applies only to those crimes which are divided into degrees, e.g., unlawful homicide . . . . If an accused is charged with the highest degree of such a crime, the court should charge the jury

of anything which could rationally[12] be called "premeditation" or "deliberation". On the basis of the evidence presented at the sentencing hearing, the jury recommended a sentence of life imprisonment.

The capriciousness of Florida's capital procedure was again exemplified, however, when the trial court rejected the jury's recommendation of mercy (a recommendation presumably -- although not ascertainably -- based on a recognition of petitioner's heavy drinking)[13] and imposed a death sentence on the basis of undisclosed information in the pre-sentencing investigation report.

11/ cont'd.

> on all lesser degrees. In this category it is immaterial whether the indictment specifically charges the lesser degrees or whether there is any evidence of a crime of such degree. Killen v. State, 92 So.2d 825 (Fla. 1957); Brown v. State, 124 So.2d 481 (Fla. 1960). The court must instruct on the lesser degrees simply because §919.14 clearly requires it, and not because such degrees are necessarily included lesser offenses . . . . If the evidence is sufficient to support a verdict of guilty of the offense charged, the jury has the power, under §919.14 to find the accused guilty of a lesser degree of the offense regardless of the lack of evidence as to such degree."

Brown v. State, supra, 206 So.2d at 381. In the 1960 Brown v. State case cited in the 1968 Brown decision, the Court held that manslaughter was, with second and third degree murder, a "lesser degree" of a first degree murder charge. 124 So.2d 481, 493 (1960).

12/ Petitioner's statement that he "was going back and beat hell out of his wife," T. 187, made to "Buckeye" at approximately 11:00-11:30 p.m., June 29, 1973, T. 186, is the only bit of circumstantial evidence from which premeditation and deliberation might be inferred.

13/ Two psychiatrists conducted pre-trial psychiatric examinations of petitioner. Dr. George W. Barnard concluded that "[in] my medical opinion the prisoner is an alcoholic, R. 10; "[i]t is also my medical opinion had he not been under the influence of alcohol at the time of the alleged crime, he would have been competent, knowing right from wrong and being capable of adhering to the right," ibid. Dr. Frank Carrera III stated similar conclusions, R. 14-15, adding that "[b]ecause of his history of alcoholism I would recommend that he be provided with treatment for his alcoholism." R. 15.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER NONDISCLOSURE OF A "CONFIDENTIAL" PORTION OF A PRE-SENTENCE INVESTIGATION REPORT TO A DEFENDANT CONVICTED OF A CAPITAL CRIME CONSTITUTES A DENIAL OF THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND OF THE RIGHT TO A FAIR HEARING AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, IN A CASE WHERE THE TRIAL JUDGE DECLINES TO ACCEPT A JURY RECOMMENDATION OF A LIFE SENTENCE AND INSTEAD IMPOSES THE DEATH SENTENCE PARTIALLY ON THE BASIS OF THE PRE-SENTENCE REPORT.

On the day petitioner's sentencing jury returned an advisory sentence of life imprisonment, the trial court ordered a Pre-Sentence Investigation Report prepared by the Florida Parole and Probation Commission. T. 357. Twenty days later, on January 30, 1974, after receiving the PSI Report, the trial court overruled the jury's recommendation and sentenced petitioner to death. R. 49-51. The "Findings of Fact" entered by the trial court 14/ recited that this sentence was being imposed "after . . . the receipt of a pre-sentence investigative report on said defendant . . . and receipt by the State and defendant's attorney of a copy of that portion thereof to which they are entitled"

14/ These "Findings of Fact" were apparently announced in open court, although the transcript of this proceeding is not included in the record of this case. The "Judgment and Sentence", R. 51, recites that after the "Findings of Fact" were filed, "the defendant . . . [was] asked by the court whether he had anything to say why sentence of the law should not now be pronounced upon him, and . . . [said] nothing to preclude such sentence." Sentence and judgment were "DONE AND ORDERED in open court . . . this 30th day of January, 1974."

and "after . . . reviewing the factual information contained in said pre-sentence investigation." R. 49 (emphasis added). 15/ The trial court apparently did not make full disclosure to petitioner of the contents of the PSI Report. 16/ Dissenting in the court

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15/ The three pages of the PSI Report which were furnished to petitioner were added to the record below in a Supplement to Transcript of Record, filed in the Florida Supreme Court on May 8, 1974; this Supplement is unpaginated.

16/ Florida Rules of Criminal Procedure 3.710 (1974-1975 supp.) authorize the trial court to request a presentence report from the Probation and Parole Commission "[i]n all cases in which the court has discretion as to what sentence may be imposed." Rule 3.713(a) (1974-1975 supp.) states that "[t]he trial judge may disclose any of the contents of the presentence investigation to the parties prior to sentencing." (Emphasis added.) Rule 3.713(b)(1974-1975 supp.) provides:

> "[t]he trial judge shall disclose all factual material, including but not limited to the defendant's education, prior occupation, prior arrests, prior convictions, military service and the like, to the defendant and the State a reasonable time prior to sentencing. If any physical or mental evaluations of the defendant have been made and are to be considered for the purposes of sentencing or release, such reports shall be disclosed to counsel for both parties."

(Emphasis added). The 1972 legislative committee annotation to Rule 3.713 stated:

> "This rule represents a compromise between the philosophy that presentence investigations should be fully disclosed to a defendant and the objection that such disclosure would dry up sources of confidential information and render such report virtually useless. (a) gives the trial judge discretion to disclose any or all of the report to the parties. (b) makes mandatory the disclosure of factual and physical and mental evaluation material only. In this way, it is left to the discretion of the trial judge to disclose to a defendant or his counsel any other evaluative material. The Judicial discretion should amply protect

below, Mr. Justice Ervin declared:

> "it appears from the record that there was a 'confidential' portion of the PSI report made available to the trial judge which was not provided to either Appellant [petitioner] or Appellee. In fact, it is unclear from the record whether this Court has been provided the 'confidential' portion thereof for our review, a critical final step between conviction and imposition of the death penalty -- one of the safeguards outlined in Dixon [State v. Dixon, 283 So.2d 1 (Fla. 1973)]. What evidence or opinion was contained in the 'confidential' portion of the report is purely conjectural and absolutely unknown to and therefore unrebuttable by Appellant. We have no means of determining on review what role such 'confidential' information played in the trial judge's sentence, and thus I would overturn Appellant's death sentence on the basis of this fundamental error alone."

Gardner v. State, Fla. Sup. Ct. No. 45,106 (Feb. 26, 1975), slip op. at 6-7 (emphasis in original); App. A, infra, at 6a-7a.

The Court should grant certiorari to consider whether such nondisclosure violates a capital defendant's right to due process of law. It is established that sentencing procedure is not "immune from scrutiny under the due-process clause," Williams v. New York, 337 U.S. 241, 252 n.18 (1949). Accord: Townsend v. Burke, 334 U.S. 736 (1948). In Specht v. Patterson, 386 U.S. 605 (1967), this Court ruled that where "the commission of a specified crime" is not alone the basis for sentencing and where instead "a new finding of fact . . . that was not an

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16/ cont'd.

> the confidentiality of those sources who do not wish to be disclosed, while the availability of all factual material to the defendant will permit him to discover and make known to the sentencing court any errors which may appear in the report."

Note, Fla. R. Crim. P. 3.713 (1974-1975 supp.).

ingredient of the offense charged," 386 U.S. at 608, is the predicate for a special sentence, ordinary due process safeguards must be extended to a convicted defendant in the proceeding to determine the special sentence. See also Humphrey v. Cady, 405 U.S. 504 (1972). The Florida capital sentencing procedure is precisely analogous to the Colorado Sex Offenders Act procedures challenged in Specht. In order to convict for first degree murder, the State must prove beyond a reasonable doubt "[t]he unlawful killing of a human being, . . . perpetrated from a premeditated design to effect the death of the person killed . . . or . . . committed by a person engaged in the perpetration [of specified felonies] . . . or . . . result[ing] from the unlawful distribution of heroin [under certain circumstances]." Fla. Stat. Ann. §782.04(1)(a)(1974-1975 supp.). In order to impose a death sentence, however, "[s]eparate proceedings," Fla. Stat. Ann. §921.141(1)(1974-1975 supp.) must be convened, and further special findings must be made. The trial court must enter "[f]indings in support of sentence of death," §921.141(3):

> "if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
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> (a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and
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> (b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (6) and (7) and upon the records of the trial and the sentencing proceedings."

§921.141(3).[17/] Proof of the statutory "aggravating circumstances"

17/ This section further provides that if the formal written

is not a necessary part of the elements the State must establish to secure a guilty verdict at the first stage of Florida's bifurcated capital procedure.

It is not clear that the full panoply of due process protection available at a criminal trial should be applicable at the second stage of a bifurcated capital trial, cf. Specht v. Patterson, 386 U.S. 605, 606 (1967); Witherspoon v. Illinois, 391 U.S. 510, 522 n.20 (1968). In order to base sentences on "the best available information rather than on guesswork and inadequate information," it may be that such information should not be restricted "to that given in open court by witnesses subject to cross-examination." Williams v. New York, 337 U.S. 241, 249-250 (1949)(footnote omitted). Given the traditional flexibility of due process protections, see, e.g., Boddie v. Connecticut, 401 U.S. 371, 378 (1971), the Court should consider how the

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17/ cont'd.

findings concerning statutory aggravating and mitigating circumstances are not made, the trial court "shall impose sentence of life imprisonment." At the second stage of a capital trial, Florida trial judges do not have a broadly calibrated range of sentences to impose, since they may only sentence a convicted defendant to death or life imprisonment. Fla. Stat. Ann. §755.082(1)(1974-1975 supp.). The sentencing discretion of the trial judges is ostensibly "controlled and channelled [by the procedures required by §921.141] until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). (But see App.B, infra at). In Williams v. New York, 337 U.S. 241 (1949), this Court noted that New York trial judges possessed "a broad discretion to decide the type and extent of punishment for convicted defendants," 337 U.S. at 245, and that New York criminal statutes typically set "wide limits for maximum and minimum sentences", 337 U.S. at 251.

need for comprehensive information on which to base sentences should be balanced against the right of a convicted defendant to basic procedural fairness. In the present case, the non-disclosure to petitioner of the confidential information in the PSI Report appears fundamentally unfair. The sentencing jury, which had not seen the Report, recommended a sentence of life imprisonment. But, after reviewing this Report, the trial court imposed a sentence of death. The portion of the Report which was made available to petitioner contained vague and pejorative statements such as "Law enforcement authorities are quite strong in their opinion of the subject, they consider the subject a menace to society. They feel he should not be let to roam the streets . . . ."[18/] It is impossible to speculate where a report of this sort may have wandered, whether or how it might have supported the amorphous and damaging "opinion" of unnamed police officers regarding petitioner, and what additional pejorative information it may have contained. But surely the petitioner, with his life at stake, was entitled to sufficient information so that his attorney could advisedly decide whether any or all portions of the Report -- presently disclosed or undisclosed -- were subject to refutation or explanation. It is established that counsel "is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." Mempa v. Rhay, 389 U.S. 128, 135 (1967).

18/ Supplement to Transcript of Record (filed in Florida Supreme Court on May 8, 1974)(unpaginated).

By not making this portion of the Report available to petitioner and his counsel, the trial court denied petitioner's right to counsel just as effectively as if it had refused to allow petitioner to have counsel present with him when sentence was imposed. See Townsend v. Burke, supra, 334 U.S. at 738-741.

It is, of course, unclear from this record what confidential information the trial court based its death sentence upon. Petitioner should surely not be penalized because he cannot recite with particularity the information which was not disclosed to him. "The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society." Marion v. Beto, 434 F.2d 29, 32 (CA5 1970). To ward against unconstitutional jury selection practices at capital trials, this Court has required a record to be kept of the exclusion for cause of veniremen with conscientious scruples against the death penalty, see Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968), and it has reversed death sentences where the record was silent as to the specifics of such exclusions, Mathis v. Alabama, 403 U.S. 946 (1971), rev'g 283 Ala. 308, 216 So.2d 286 (1968); Funicello v. New Jersey, 403 U.S. 948 (1971), rev'g State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968). Similarly, in cases where a sentence of death at a bifurcated trial is predicated upon particular findings by a sentencing judge or jury, the Court should require that the record affirmatively indicate the factual basis upon which the findings are made in order to prevent such a sentence from being imposed "on the basis of assumptions . . . which [are] . . . materially untrue." Townsend v. Burke, supra,

334 U.S. at 741. This entails, at the very least, providing counsel for a capital defendant with all investigative reports prepared to assist the trial judge in imposing sentence. While counsel might not have changed the sentence" had petitioner been apprised of the entire contents of the PSI report, "he could have taken steps to see that the conviction and sentence were not predicated on misinformation," Townsend v. Burke, supra, 334 U.S. at 741.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

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